

WILMERHALE

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April 26, 2019

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BY ECF

The Honorable Raymond J. Dearie
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Schwartz v. City of New York*, No. 1:19-cv-463

Dear Judge Dearie,

I write on behalf of Defendants in the above-mentioned case to seek leave to file the attached sur-reply in further opposition to Plaintiff's motion for a preliminary injunction (Dkt. 23).¹ Plaintiff consents to this request.

In connection with his reply brief in support of his application for a preliminary injunction (Dkt. 25), Plaintiff for the first time offered the declaration of Dr. Lawrence S. Mayer (Dkt. 25-1) and the declaration of Rabbi Dr. Tzvi Hersh Weinreb (Dkt. 25-2). Plaintiff now relies on these belated submissions to satisfy his burden in seeking a preliminary injunction. All the information he now seeks to marshal in support of his application, however, was available to him at the time he moved for a preliminary injunction. *See Burroughs v. County of Nassau*, 2014 WL 2587580, at *13 (E.D.N.Y. June 9, 2014) (noting impropriety of "submit[ting] on reply evidentiary information that was available to the moving party at the time that it filed its motion" (citation omitted)). Absent the opportunity to address these submissions, Defendants will be severely prejudiced in their defense of the City's conversion therapy statute. *See Wolters Kluwer Fin. Servs. Inc. v. Scivantage*, 2007 WL 1098714, at *1 (S.D.N.Y. Apr. 12, 2007); *see also Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 144 (E.D.N.Y. 2012) (finding that additional evidence filed with reply brief did not prejudice defendant because defendant was permitted to file sur-reply).

¹ Motions for leave to file a sur-reply "are subject to the sound discretion of the court." *Anghel v. N.Y. State Dep't of Health*, 947 F. Supp. 2d 284, 293 (E.D.N.Y. 2013) (citation omitted). Sur-replies are particularly appropriate when a reply brief includes new arguments or information. *See id.*

WILMERHALE

Hon. Raymond J. Dearie
April 26, 2019
Page 2

The attached sur-reply is short and to the point; it does not make new legal arguments or offer any new factual submissions. It is limited to responding to the testimony offered by Plaintiff's new declarants, which Defendants would have offered in their opposition brief had the declarations been submitted with Plaintiff's initial application. Defendants therefore request leave to file the attached sur-reply. Plaintiff consents to this request.

Respectfully submitted,

/s/ Alan Schoenfeld
Alan Schoenfeld

cc: All counsel via ECF

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

DAVID SCHWARTZ,

Plaintiff,

-v-

THE CITY OF NEW YORK, and LORELEI
SALAS, in her official capacity as
Commissioner of the New York City
Department of Consumer Affairs,

Defendants.

Case No. 1:19 Civ. 00463 (RJD) (ST)

**DEFENDANTS' [PROPOSED] SUR-REPLY TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff moved to preliminarily enjoin enforcement of New York City's Local Law 22 of 2018 in February 2019, more than eight months after the law took effect. Continuing with this pattern of tardy submissions, Plaintiff filed two declarations with his reply in further support of his motion. Those declarations were impermissibly filed after Plaintiff's opening brief, are not responsive to the declarations submitted in support of Defendants' opposition, and provide no information relevant to the motion for preliminary injunction. The Court should disregard these belated declarations and deny Plaintiff's motion in full for the reasons set forth in Defendants' opposition.

Weinreb Declaration

The Weinreb Declaration proffers information on Rabbi Menachem Mendel Schneerson and the Chabad Chassidic movement within Orthodox Judaism that follows Rabbi Schneerson's teachings. This information, as well as Rabbi Weinreb's personal experience with Rabbi Schneerson's teachings, bear no relevance to Plaintiff's motion for preliminary injunction. Plaintiff's religious faith is not at issue in this case—nor is the faith of any colleague of his, including Rabbi Weinreb. Nowhere in its opposition brief did Defendants question whether Plaintiff believes that the principles he implements in his therapy practice are consistent with his religious beliefs, or cast doubt on the sincerity of those beliefs. Those facts are irrelevant to the question whether Local Law 22 is a permissible consumer protection regulation intended to limit a commercial practice that Defendants reasonably believe carries risks of harm that far outweigh its questionable effectiveness.

Mayer Declaration

Dr. Mayer purports to make four primary assertions: (1) sexual orientation and gender identity are or may be fluid, (2) certain individuals find benefits in conversion therapy, (3) the

science evaluating conversion therapy and its risks is inconclusive, and (4) anecdotes of harm are not conclusive proof that conversion therapy causes harm.¹ None of these observations is inconsistent with those of Defendants' declarants, nor do they bear any legal significance to Plaintiff's pending motion.

First, Defendants have not asserted that sexual orientation or gender identity are immutable. Rather, Defendants' position is that *SOCE therapies* have not been proven effective in changing sexual orientation or identity. PI Opp. 16; Glassgold Decl. ¶ 22. Second, Defendants do not dispute the fact that some patients may have positive experiences while in conversion therapy; Defendants do, however, dispute that those benefits result from efforts to change patients' sexual orientation. As Dr. Glassgold opined, "the benefits reported by participants in sexual orientation change efforts can be gained through approaches that do not attempt to change sexual orientation." Glassgold Decl. ¶¶ 24, 32. Indeed, research shows that interventions involving "acceptance and support," "social support," and "identity exploration and development" without an objective of altering sexual orientation benefit adults who are uncomfortable with their sexual orientation without posing the risks of mental, emotional, or psychological harm associated with SOCE. *See id.* ¶ 43; *see also* Haldeman Decl. ¶ 23.

Third, Dr. Mayer also rightly points out that much of the available empirical data is inconclusive regarding the efficacy and harmfulness of SOCE. To the extent that Dr. Mayer asserts that some studies show efficacy, his claims are unfounded—the studies he cites were not

¹ Defendants question whether Dr. Mayer's "declaration"—which is largely just a collection of entirely decontextualized quotes from various articles and studies—comports with the standards for admissible expert opinions. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("To warrant admissibility, however, it is critical that an expert's analysis be reliable at every step."). Defendants reserve their rights to move to exclude Dr. Mayer's testimony. For present purposes, however, Defendants maintain that even if the Court looks past the procedural problems with the Mayer Declaration, its contents are irrelevant to the pending motion for a preliminary injunction.

scientifically sound, have since been disproved, or were later retracted. *See* Glassgold Decl. ¶ 23; Haldeman Decl. ¶¶ 10-16. Most egregiously, Dr. Mayer cites a study by Dr. Robert Spitzer as evidence of SOCE’s potential effectiveness (Mayer Decl. at 8), without acknowledging that Dr. Spitzer later retracted that study in full as methodologically flawed and invalid. *See* Haldeman Decl. ¶ 16.² In light of all of the available science, as Defendants’ declarants note, all of the major mental health associations have rejected SOCE as a valid treatment. *See* Glassgold Decl. ¶ 33 (listing organizations); Haldeman Decl. ¶¶ 6, 27-29. Dr. Mayer’s points are not inconsistent with Dr. Glassgold’s or Dr. Haldeman’s—all three agree that the science surrounding the SOCE is sparse. *See* Glassgold Decl. ¶¶ 21, 25; Haldeman Decl. ¶¶ 9-10; Mayer Decl. at 6. Nonetheless, Defendants’ declarants and the sources on which they rely make clear that Dr. Mayer’s perspective diverges with the general consensus in the psychological and psychiatric community based on the limited evidence that is available. As Dr. Glassgold states in her declaration, “SOCE is rejected by mainstream mental health practitioners and professional association and guidelines because . . . it is unsupported by valid evidence of efficacy.” *See* Glassgold Decl. ¶ 21; *see also* Haldeman Decl. ¶¶ 6, 11.

Fourth, Defendants make no assertion that individual anecdotes detailing the trauma stemming from SOCE are conclusive, scientific evidence that SOCE is harmful. In that regard, Defendants agree with Dr. Mayer. *See* Mayer Decl. ¶¶ 10-16; *see also* Haldeman Decl. ¶ 9. However, the examples of Leelah Alcorn and Matthew Shurka do demonstrate specific harms that have flowed directly from conversion therapy. *See* Nov. 30, 2017 Comm. Rep. at 3; PI Opp. 17. Moreover, while the scientific data on harm caused by SOCE is not robust, it has been

² In addition to retracting his study, Dr. Spitzer further issued a public apology in recognition of the fact that his study lent an undeserved appearance of legitimacy to SOCE and of the harm done to individuals who are subject to SOCE. *See* Haldeman Decl. ¶ 16.

sufficient for dozens of well-established and mainstream professional organizations of experts to conclude that SOCE carries a risk of harm that outweighs any potentially desirable effects. *See* Glassgold Decl. ¶¶ 28-33; Haldeman Decl. ¶¶ 6, 17-23, 27-29. Surely the thousands of psychologists, psychiatrists, social workers, and other professionals who belong to those reputable organizations are qualified to evaluate the underlying science and take an informed position on this issue, which the City Council rightfully credited in enacting Local Law 22. *See* Nov. 30, 2017 Comm. Rep. at 5. While the experiences of individuals are not on their own scientific evidence, their stories, in conjunction with the limited, but sufficient, universe of research linking SOCE with harmful effects on patients, form part of the sound basis in evidence that the City Council relied on in enacting Local Law 22.

Dr. Mayer's last point, that the majority of those seeking conversion therapy do so for religious reasons, is wholly irrelevant. The motivation of those seeking conversion therapy has no bearing on the motives underpinning Local Law 22, the City Council's authority to pass Local Law 22, or the dangers of practicing conversion therapy. Those seeking therapy are not being regulated by Local Law 22; only those providing therapy, for a fee, are subject to Local Law 22.

To the extent that the Mayer Declaration purports to undermine the City Council's basis for enacting Local Law 22, any such conflict is still insufficient to demonstrate that Plaintiff can succeed on the merits of his constitutional claims. The City Council is not constrained to act only where there is absolute medical, scientific, or empirical agreement. To the contrary, the legislative record reflects that the City Council considered empirical evidence and the general consensus among numerous well-respected professional associations in making its decision. The legislature's well-supported judgment is sufficient to demonstrate a compelling government interest and the narrow-tailoring of the law consistent with strict scrutiny; a basis in undisputed

evidence is not required. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-36 (2010) (deferring to legislative and executive branch’s evaluation of facts and corresponding decisions implicating free speech and rejecting dissent’s position that constraints could only be justified by “hard proof” of causal link); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (“Our cases have never required that municipalities make such a showing [that law will achieve intended outcome using empirical data], certainly not without actual and convincing evidence from plaintiffs to the contrary.”). Accordingly, even though the Mayer Declaration emphasizes studies that failed to conclude that SOCE can harm patients and studies that purport to demonstrate that SOCE can be beneficial or effective for some patients, those data points are too scattered and inconclusive to undermine the City Council’s sound judgment based on the available data and information.

CONCLUSION

For the foregoing reasons, the Court should disregard the Weinreb and Mayer Declarations and deny Plaintiff’s motion for a preliminary injunction.

Dated: April 26, 2019

Respectfully submitted,

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